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Supreme Court of the United States

OCTOBER TERM, 1959

No. 882

MAX WINZELBERG, an Individual,
Petitioner,

v.

R. K. BAKING CORP., and BAKERY & PASTRY DRIVERS AND HELPERS UNION, LOCAL NO. 802, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents,

and

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Max Winzelberg, an individual, hereafter called Petitioner, is the complainant in the proceedings instituted originally herein by the National Labor Relations Board, hereafter called Labor Board or Board. Petitioner respectfully prays that a writ of certiorari issue to review so much of the decree of the United States Court of Appeals for the Second Circuit, entered January 27, 1960, as (1) grants enforcement only in part to the Board's order for back pay to the extent that said Court of Appeals awards or enforces back pay of $696.36 and no more and reduces or modifies or both the back pay award of the Board to Petitioner in the sum of $12,438.11; (2) refuses to enforce the entirety of the back pay

award of the Board to Petitioner in the sum of $12,438.11; and (3) refuses to enforce the provision of the said order of the Board instating Petitioner to a permanent position.

Citations to Opinions Below

The original opinion, decision and order of the Board, dated March 3, 1953, together with the single Intermediate Report dated November 13, 1952, are found reported in 103 N. L. R. B. 227.

The first opinion of the Court of Appeals for the Second Circuit, on the Labor Board's petition for enforcement of the aforesaid order, is dated February 15, 1954, and is found reported in 210 F. 2d 772. It is not found in the Board's Appendix herein and is therefore reproduced in its materiality as an appendix to this petition. The decree thereon, subsequent to the Board's petition for rehearing which resulted in a modification by the Court of its said decision, is dated September 10, 1954, and is printed in the "Supplemental Appendix to Petitioner's Brief" in the Court of Appeals (hereinafter cited as "Board's Appendix" or B. A.), at p. 84.

The second supplemental opinion, decision and order of the Labor Board, dated May 6, 1958, together with the Supplemental Intermediate Report dated April 11, 1955, and the Second Supplemental Intermediate Report dated May 31, 1957, are found reported in 120 N. L. R. B. 772 and are printed also in B. A. at pp. 4, 60, and 23 respectively.

The second opinion of the Court of Appeals for the Second Circuit, on the Board's second petition for enforcement of its aforesaid second supplemental order, is dated December 24, 1959, and is found reported in 273 F. 2d 407, and is printed also in B. A. at p. 296; the decree thereon is at B. A., p. 305, and is reproduced herein as an appendix to this petition.

Jurisdiction

The date of the decree sought to be reviewed herein and the time of its entry is January 27, 1960.

The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. §1254(1), as permitted by and in 49 Stat. 453, 29 U. S. C. §160(e), as amended.

Questions Presented

1. In general, can or may the Court of Appeals, on the facts in this case, refuse to enforce an order of the Labor Board, or any portion thereof, based upon substantial evidence, to which two Trial Examiners and four plus three Labor Board Members have unequivocally assented, and which order, in all its parts, in the opinion of said persons, is necessary and required in order not only to wipe out the conceded unfair labor practices engaged in herein by the two Respondents but also to effectuate the public purposes of the National Labor Relations Act, as amended?

2. In particular, can or may the Court of Appeals, on the facts in this case, refuse to enforce in full, or else modify and enforce only in part as so modified, so much of an order of the Labor Board, based upon substantial evidence, to which two Trial Examiners

and four plus three Labor Board Members have unequivocally assented, which awards net back pay to the Petitioner in the sum of $12,438.11 for the damages and losses suffered by him because of the conceded discrimination practiced against him by the two Respondents and which order also effectuates the public purposes of the Act?

3. In particular, can or may the Court of Appeals, on the facts in this case, refuse to enforce in full, or else modify and eliminate and refuse to enforce so much of an order of the Labor Board, based upon substantial evidence, to which two Trial Examiners and four plus three Labor Board Members have unequivocally assented, which directs instatement to a permanent job of Petitioner by Respondent R. K. Baking Corp. and requires Respondent Teamsters Local 802 to notify said R. K. that it does not object to such instatement and which order also effectuates the public purposes of the Act?

Statutes Involved

The discrimination being conceded herein, as the Court of Appeals has affirmed the Board's finding thereon, the only statutory provision actually involved relates to the power of the Board to order instatement and back pay to effectuate the policies of the Act, as amended, 49 Stat. 453, 29 U. S. C. §160(c) and (e), the pertinent texts of which follow:

§160(c):

". . . If upon a preponderance of the testimony taken the Board shall be of the opinion that

any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . ."

§160(e):

". . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . ."

Statement

A. Basis for Jurisdiction

The basis for federal jurisdiction in the court of first instance is the review by the Court of Appeals for the Second Circuit on a petition for enforcement by the Labor Board, which proceeded under 49 Stat. 453, 29 U. S. C. §160(e), the unfair labor practices having occurred within that Circuit and the Respondents residing or transacting business therein.

B. Material Facts

Max Winzelberg, the Petitioner, during the periods involved herein, was a salesman on a retail bakery route. He filed charges with the Board's Second Region on December 27, 1950, against Gottfried Baking Co., Inc., his former employer, alleging a violation of the amended National Labor Relations Act, §8(a)(3) and (1) [29 U. S. C. §158(a)(3) and (1)]. This received Case No. 2-CA-1741.

Thereafter Petitioner filed separate charges on February 16, 1951, against Teamsters Local 802, one of Respondents herein, alleging a violation of §8(b)(1)(A) and (2). This received Case No. 2-CB-578.

Under date of July 26, 1951, amended charges in both of the above were filed. In addition, Petitioner filed separate charges against R. K. Baking Corp., alleging violations of §8(a)(3) and (1), as well as of §8(a)(4). This received Case No. 2-CA-2067.

The complaint against each employer, i. e., Gottfried and R. K., alleged that each had discriminated by executing and maintaining an illegal union-security agreement with Teamsters Local 802, and also by refusing to hire Petitioner because he was not a member of the Teamsters in good standing. Local 802 was charged with causing each employer thus to discriminate against Petitioner. Additionally, R. K. was alleged to have violated §8(a)(4) by offering Petitioner employment if he withdrew the charges against the Teamsters (B. A., pp. 23-24).

On December 12, 1951, all three cases were consolidated for trial and, on various dates between February 4, 1952, and May 7, 1952, hearings were conducted before Trial Examiner Scharnikow who, on November 13, 1952, issued his single intermediate report and recommended decision. On March 3, 1953, Chairman Herzog and Members Styles and Peterson adopted all material findings, conclusions, and orders. (See 103 N. L. R. B. 227, summarized and cited hereinafter.) All charges against Gottfried eventually became unimportant and are not further considered (it was found to have committed an unfair labor practice), but only those against Teamsters alleging it had caused Gottfried to discriminate against Petitioner were dismissed; only the §8(a)(4) charges against R. K. were likewise dismissed (B. A., pp. 24-25).

The Labor Board, *inter alia*, upheld the Trial Examiner's findings, etc., of the illegality of the union-security clauses and the discriminatory rejection of Petitioner's application for a job by R. K.; it also adopted the Examiner's recommendations directing R. K. to offer Petitioner immediate employment as a route salesman, and directed both R. K. and Teamsters jointly and severally to make Petitioner whole for any loss of pay or earnings suffered by him because of the discrimination (B. A., pp. 28-29).

On September 4, 1953, the Board, for the first time, petitioned the Second Circuit for enforcement. On February 15, 1954, the Court upheld all findings of discrimination but rejected the remedy of instatement of Petitioner by R. K., with back pay against it and Teamsters, and the necessity of said R. K. to

establish another sales route for Petitioner. The reasons of the Court were that "such an offer of *permanent* employment (requiring, as it would, the establishment of another sales route) was 'too drastic a remedy,' and the loss of earnings beyond the clearly contemplated period of Winzelberg's temporary replacement of Greenhoots, the sick employee, would be 'too conjectural to be computed.' . . ." (B. A., pp. 29-30).

On March 10, 1954, the Board's General Counsel petitioned for a rehearing, and on May 17, 1954, the Court granted the petition and modified its decision. The decree on such modification was entered September 10, 1954. The modification consisted in the Court's withdrawal of that portion of its original decision of February 15, 1954, just discussed and quoted in the preceding paragraph's last sentence, and now remanding the proceedings to the Board (B. A., pp. 97-98). The fourth paragraph of the decree required

> "that the case be remanded to the Board for the purpose of hearing and determination of the specific obligation of Respondents R. K. and the Union under that portion of the Board's order of March 3, 1953, which [1] requires R. K. to offer Max Winzelberg immediate employment as route salesman, and [2] requires that Respondents R. K. and the Union jointly and severally make Winzelberg whole for the loss of earnings incurred because of the discrimination practiced against him" (B. A., p. 85).

Between December 21, 1954, and February 9, 1955, hearings pursuant to the said paragraph 4's two re-

manding requirements on instatement and back pay were held before Trial Examiner Buchanan. Under date of April 11, 1955, said Examiner rendered a Supplemental Intermediate Report (B. A., pp. 60-84) which, on the said two remanded issues, found for Petitioner (B. A., pp. 83-84).

During the course of the hearings before Examiner Buchanan, Teamsters Local 802 and R. K. both sought to introduce newly-found evidence allegedly disclosing fraud by Petitioner and one Charles Gottfried, and also a lack of good faith by Petitioner in his application for employment (see B. A., p. 33); this was rejected by the Examiner because of the limitations imposed by the scope of the remand, and the Board upheld this rejection. However, after the issuance of the said Supplemental Intermediate Report of April 11, 1955, the Board, under date of October 3, 1955, now petitioned the Court to amend the said remand order to enable the receipt of evidence as to all the circumstances bearing upon the aforesaid new issues. Respondents R. K. and Teamsters were not only in favor of this motion to enlarge the remand order but each also moved for additional and further enlargement. On November 30, 1955, the Second Circuit disposed of all three requests by deciding that the "Motion of the Board [is] granted, all other motions denied" (B. A., pp. 86-97, quoted at p. 100). The Board, on April 10, 1956, ordered the record to be reopened for a further hearing on the said *bona fides* and on the alleged fraud (B. A., pp. 97-101).

Between July 23, 1956, and March 27, 1957, hearings on these new issues were held before Examiner Scharnikow. (The reason for this stretch of time

is that a proposed settlement among the parties was rejected by the Board. B. A., p. 35, fn. 9.) Under date of May 31, 1957, the Examiner issued a Second Supplemental Intermediate Report (B. A., pp. 23-60) and urged, in effect, complete rejection of the claims by R. K. and Teamsters, and recommended "that the Board confirm in all respects the terms of the orders issued by it on March 3, 1953, against the Respondents R. K." and Teamsters (B. A., p. 60).

One year after the Second Supplemental Intermediate Report was issued, and on May 6, 1958, Chairman Leedom and Members Rodgers, Bean and Jenkins issued their Supplemental Decision and Order (B. A., pp. 4-19, reported in 120 N. L. R. B. 772). This was now based not only upon the entire original record in the case but also upon the Buchanan and Scharnikow supplemental intermediate reports, the exceptions of all parties thereto, and the briefs. The Board now "hereby adopts the findings, conclusions, and recommendations of Trial Examiners Scharnikow and Buchanan, with the following modifications" (B. A., p. 7).

The Board's modifications on jurisdiction (B. A., pp. 7-8) and fraud (B. A., pp. 8-10) are not material to the consideration of the instant petition for certiorari and are not otherwise presented.

On the question of Petitioner's right to employment and to back pay, the Board agreed "with Trial Examiner Buchanan that as of the close of the hearing before him Winzelberg was entitled to employment in a job as a route salesman. We further find that Winzelberg is entitled to net back pay amounting

to $12,438.11. . . . In so finding, we rely on the findings and reasoning of Trial Examiner Buchanan with the following exceptions and modifications" (not material herein) (B. A., pp. 11-12).

Under date of March 20, 1959, the Board again petitioned the Second Circuit for enforcement of its aforesaid Supplemental Decision and Order (B. A., pp. 280-283).

Under date of December 24, 1959, the said Court rendered its decision enforcing in part and denying enforcement in part (B. A., pp. 296-304). The Court sustained the Board on the subsidiary issues of Petitioner's *bona fides* as to his application for employment, and on the question of the alleged fraud involving Petitioner and said Charles Gottfried, but as to the important and material questions of instatement and the amount of back pay refused to enforce the first portion, i. e., instatement, and reduced the Board's award of $12,438.11 in back pay to $696.36, and granted enforcement only as to said reduced amount.

The Court's decree on such opinion is dated and filed January 27, 1960 (B. A., pp. 305-307), and is reproduced as an appendix hereto, and the certification of the record and proceedings below is at B. A., p. 308.

It is from the said decree of January 27, 1960, and as based upon the said decision and opinion of December 24, 1959, that this instant petition for certiorari is taken.

Reasons for Granting the Writ and Arguments Thereon

A. In General

The reasons generally relied on for the allowance of the writ herein, and as more fully particularized below, are that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in Labor Board effectuating orders as to call for an exercise of this Supreme Court's power of supervision; that the Court of Appeals has ignored the usual dichotomy between administrative effectuation of statutory policies consonant with its delegated powers and the judiciary's power of review; that the Court of Appeals has erred grievously in not following the statutory direction making Labor Board findings, supported by substantial evidence on the whole record, conclusive, and with these findings the orders based upon and logically inferred therefrom necessary to effectuate the policies of the Act; that the Court of Appeals arbitrarily and capriciously ignored the findings, conclusions, recommendations, directives, and orders of three Trial Examiner intermediate reports, and seven different and separate Members of the Labor Board, all of whom unanimously and continuously voted for instatement of and $12,438.11 back pay to Petitioner; that the Court of Appeals has failed to follow its own original determination and opinion as the law of the case and thereby misled and lulled the Labor Board into proceeding upon a basis other than eventually was utilized by the said Court in refusing to enforce the Board's order; that under the circumstances herein the superintending power of this Supreme Court to cure inequities in the federal judicial system should be here exercised.

B. Principles, Facts, and Law Involved

It is respectfully urged that not alone is the resolution of the credibility of the witnesses for the trial examiners who saw the witnesses under cross-examination, *N. L. R. B.* v. *Steel, Metals, Alloys & Hardware Fabricators and Warehousemen, Local 810, Teamsters Union* (2d Cir. 1960), 274 F. 2d 688, citing and following *Universal Camera Corp.* v. *N. L. R. B.* (1951), 340 U. S. 474, but in the instant case the Second Circuit has adopted all findings of fact as to §8(a)(1) and (3) and §8(b)(1)(A) and (2) violations respectively by Respondents R. K. and Teamsters, *N. L. R. B.* v. *Gottfried Baking Co., et al.* (2d Cir. 1954), 210 F. 2d 772, as reaffirmed in the 1960 opinion below, B. A., pp. 297-298.

This petition for certiorari therefore turns solely upon the two remedies proposed by the Board to eradicate these violations of the Act so as "to advance the public interest," *N. L. R. B.* v. *Fant Milling Co.* (1959), 360 U. S. 301, 307-308, and the "private" remedies, *i. e.*, instatement and back pay herein, are utilized to effectuate these statutory purposes. (See, *e. g.*, the history and background of the private treble-damage remedy permitted under the Sherman Anti-trust Act. Forkosch, *Antitrust and the Consumer* [1956].)

In 1954 the Second Circuit initially felt that the instatement and back pay remedies should be rejected because "such an offer of *permanent* employment (requiring as it would the establishment of another sales route) was 'too drastic a remedy,' and the loss of earnings beyond the clearly contemplated period

of Winzelzerg's [Petitioner's] temporary replacement of Greenboots, the sick employee, would be 'too conjectural to be computed.' . . . ." (as paraphrased by Examiner, B. A., pp. 29-30). This initial rejection was not made permanent, however, for on May 15, 1956, the Second Circuit, on the Board's motion, "amended its opinion by withdrawing its partial rejection of the Board's remedy and stated it would 'suspend passing upon' the remedy and would remand the case for hearing on that issue. . . ." (B. A., p. 10, fn. 7, Board's Supplemental Decision).

For purposes of clearness in later discussing and clarity of understanding, it is repeated here that the characterization by the Court of the Board's order as "drastic" involved, as the Examiner stated in the preceding paragraph, "the establishment of another sales route." It is not instatement to an existing and open position which is "drastic," but the creation of a job by R. K. which is initially felt to be too harsh.

However, several facts and factors now enter to disclose that this 1954 suspended rejection effected a judicial mind-set in the Second Circuit, and that its 1960 opinion (on the decree of which certiorari is sought herein) erroneously overlooked, or did not give any or sufficient weight to, the newly-introduced evidence on these two remedies, especially the instatement question.

First: After the 1954 opinion the Second Circuit remanded the matter to the Labor Board. That remand was "for the purpose of hearing and determination of the specific obligations of" (B. A., p. 85) both Respondents on the two remedies of instatement and back pay. In other words, the Second

Circuit desired specific evidence to disclose the necessity and availability of these remedies. But after this remand the Board petitioned for an enlargement thereof (B. A., pp. 86-88) and R. K. and Teamsters not alone joined in but asked for a still further enlargement. The three requests for enlargement appear as follows:

By Board (B. A. 86-88)	By R. K. (B. A. 89)	By Teamsters (B. A. 93)
1. *Bona fides* of Petitioner's application for employment	1. Same	1. Same
2. Fraud by Petitioner and one Charles Gottfried	2. Implied	2. Implied
	3. Petitioner's qualifications for the job	
	4. "The effect of Winzelberg's lack of good faith and qualifications as related to a back-pay award for a period of more than four years."	
		5. "[A]ll circumstances relating to the . . . accepting of employment" by Petitioner
		6. "[A]ll circumstances relating to the . . . existence and availability of a job. . . ."

Both R. K. and Teamsters thus sought, but were denied, enlargement of the remand beyond that requested by the Board. ("Motion of the Board [is] granted, all other motions denied." B. A., p. 100.) This order became the law of the case, and the Second Circuit thus announced, impliedly, that claims 3, 4, 5, and 6 of the above tabulation were resolved in favor of the Board (and also the Petitioner herein). But the Board nevertheless went beyond its requirements, and the Second Circuit never even followed through on its own order!

For example, relying upon the Second Circuit's denial of R. K.'s and Teamsters' motions to further enlarge, and sticking to the terms of the remand as slightly enlarged, the Board and its Examiners could well have ignored the necessity, assuming it existed, of evidence on these rejected items. But the record contains credible and credited evidence "that R. K. had a vacancy owing to route driver Greenhoot's illness and that R. K.'s president told Winzelberg that he was qualified therefor. . . . As to Winzelberg's qualifications to fill in for vacationing route salesmen and to perform the duties of a permanent route salesman . . . Winzelberg would have been at least as well qualified as Greenberg to fill the jobs held by Greenberg. . . ." (B. A., p. 11, fn. 8).

To illustrate the Second Circuit's capriciousness, its 1960 opinion, the basis for this petition for certiorari, contends that instatement and back pay are once again "drastic remedies" (B. A., p. 301). Agreed. But there are two answers to this.

(a) Legal principles: From the first day of the Act's enforcement these "drastic" remedies have been

the usual ones in situations of this sort. Since the Board was given power "to direct such action as will dissipate the unwholesome effect of violations of the Act," *Franks Bros. Co.* v. *N. L. R. B.* (1944), 321 U. S. 702; *Republic Steel Corp.* v. *N. L. R. B.* (1940), 311 U. S. 7, and since it is an unfair labor practice to refuse employment under the instant facts, *e. g., Phelps Dodge Corp.* v. *N. L. R. B.* (1941), 313 U. S. 177, instatement is not alone permitted but as collateral benefits, there is also permitted rights to seniority. *Corning Glass Works* v. *N. L. R. B.* (2d Cir. 1941), 129 F. 2d 967; *N. L. R. B.* v. *Skinner & Kennedy Stationery Co.* (8th Cir. 1940), 113 F. 2d 667. However, and regardless of the economic situation which is, in effect, self-imposed by violators, it is not the function of a Court of Appeals to remake or reject orders, however drastic, where these are supported by the facts disclosed, the factors involved, the Board's judgment thereon, the Board's expertise based upon its accumulated wisdom, and the public interests and purposes of the Act.

It is conceded that Congress has not vested an unlimited power or discretion in this Board to devise measures to effectuate the policies of the Act. *Southern S. S. Co.* v. *N. L. R. B.* (1942), 316 U. S. 31; *Republic Steel Corp.* v. *N. L. R. B., supra,* at p. 11. But neither has Congress created a super-Board in the review powers granted to the Courts of Appeals. The power of the judiciary, as discussed herein, is circumscribed by the substantial evidence rule on the whole record, which makes Board findings of fact thereon conclusive; these findings must be present so as to provide a base upon which the scope and terms

of Board effectuating orders can rest; and so long as the Board has not "patently traveled outside the orbit of its authority," *N. L. R. B.* v. *Cheney California Lumber Co.* (1940), 327 U. S. 385, 388, then its expertise and informed judgment as to these orders should be judicially accepted and followed.

The Labor Board has "ample discretion in adapting remedy to violation," *ibid.*, at p. 388, for "in the nature of things Congress could not catalogue all the devices and strategems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review." *Phelps Dodge Corp.* v. *N. L. R. B.* (1941), 313 U. S. 177, 194. See also *N. L. R. B.* v. *Seven-Up Bottling Co. of Miami, Inc.* (1953), 344 U. S. 344, 348, 348-349.

The Board may thus exercise a broad range of affirmative powers in determining what is required and best suited in a particular situation to eliminate the employer or union conduct, *Franks Bros.* v. *N. L. R. B.* (1944), 321 U. S. 702, the only judicial limitation now imposed being that the courts are "to see whether on the evidence they [the orders] go 'so beyond the authority of the Board as to require modification as a matter of law before enforcement." *May Department Stores Co.* v. *N. L. R. B.* (1945), 326 U. S. 376, 392.

The characterization by the Second Circuit of the Board's instatement and back pay orders as "drastic"

harks back to the attempted distinction between remedial and punitive orders; this Court answered this by asking the lower courts "to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act." *N. L. R. B.* v. *Seven-Up Bottling Co. of Miami, Inc., supra,* p. 348. And the Labor Board has long followed the principle of narrowly cutting and tailoring its order, to fit and strike at particular violations uncovered by actual proof in the record, see, *e. g., Bitner Fuel Co.* (1950), 92 N. L. R. B. 953; *Electric Auto-Lite Co.* (1951), 92 N. L. R. B. 1073, for this Supreme Court will not permit an enforcement decree to extend farther than is necessary to prevent the unfair labor practice. *N. L. R. B.* v. *Crompton-Highland Mills, Inc.* (1949), 337 U. S. 217, 226.

(b) The facts herein: We have heretofore particularized the initial "drastic" characterization of the Board's instatement order as related, then, to the required establishment of another sales route by Respondent R. K. On the remand, however, testimony was introduced on this question. These facts are discussed in greater detail immediately below, but now it suffices to quote from the Board's Supplemental Decision, B. A., p. 11, fn. 8, last paragraph:

> "In its brief to the Board, R. K. contends that should the Board, as recommended by Trial Examiner Scharnikow, reaffirm the remedy contained in its original Order herein, the Court's 'suspended' characterization (see fn. 7 above) of that remedy as 'too drastic' and 'too conjectural' would still be applicable. However, unlike the

situation at the time of the Court's initial opinion, the record now contains concrete evidence as to the incidence of turnover among R. K.'s route salesmen, and as to R. K.'s seniority practices, so that these factors bearing on Winzelberg's opportunities for advancement to a route salesman's job, absent discrimination, are no longer matters of conjecture."

Second: If Petitioner's qualifications for the job are not denied, and a vacancy then existed with R. K., and the Board's findings of fact throughout are not challenged, then how can the Court below deny the Board's instatement requirement? And especially when R. K. no longer is required to create a new position? The answer seemingly is that the Second Circuit indulged in a line of reasoning which is not alone fallacious logically but also factually.

The Second Circuit's reasoning is found at B. A., pp. 300-304, the second half of the Court's opinion. These are the factual bases for the different lines of reasoning between the Labor Board and the Court of Appeals:

a) February 7, 1951-March 10, 1951 (the first period involved). Since an unfair labor practice in refusing to hire occurred on February 7th, both the Board and the Circuit Court agree that Petitioner is entitled to instatement from then to March 10th. This period involved a temporary employment as a replacement for a sick driver. The sick driver returned so that, reasoned both the Board and the Court, Petitioner's temporary job would have ceased as of then.

b) June 18, 1951-September 8, 1951 (the second period involved). The date of June 18th is important to the understanding of the case. The basis for the Board's including this period in an award of back pay to Petitioner is simple: during the summer there are vacation relief men employed who substitute for the regular and permanently employed drivers who take off. These vacation relief men are taken on on a basis of seniority. The Examiner (B. A., pp. 75-76) and the Board (B. A., p. 11, fn. 8) both discussed this question and concluded that if Petitioner were instated for the first period (the Second Circuit agreed to this instatement period) then he should also be given credit for seniority which could have been so earned (the Second Circuit, as heretofore noted, concedes the giving of increased seniority upon reinstatement, *Corning Glass Works* v. *N. L. R. B.*, *supra*, during this instatement period; Petitioner having this seniority then, reasoned the Examiner and the Board, he should have been employed as a vacation relief driver, for those who were actually so employed were not senior to Petitioner; thus Petitioner was also entitled to be made whole for these losses in wages for the second period of June 18th to September 8th (throughout the proceedings it is proved that Petitioner sought, but unsuccessfully, employment in the field but had been blacklisted by the Teamsters. B. A., pp. 136-147, 150-164, esp. p. 136, by Teamsters' attorney: "On your last pint of blood will he [Petitioner] ever be able to work in the industry.").

This reasoning of the Examiner and Board, now further bolstered and proved by the evidence, was initially rejected by the Court in its first opinion of

February 15, 1954, as "too conjectural." But this portion of the initial opinion was amended, and the Court withdrew its rejection of the Board's remedy and reasoning and stated it would "suspend passing upon" this portion of the remedy and would remand for hearing on that issue. (See digest in B. A., p. 10, fn. 7.)

And the record discloses that it is exactly on this point that additional facts were adduced to support the inferences and the reasoning of the Examiner and the Board. Thus, ruled Examiner Buchanan after the remand, "The nature, the extent of that remedy remains to be determined. It may well be in any given situation we might find that there is in a practical sense, no possible remedy. That is what we are going to hear now. . . ." (B. A., p. 131). And the hearing disclosed that Petitioner had been in the industry for 33 years (B. A., p. 132), that route men took vacations during June-August (B. A., p. 135), that R. K.'s own President testified that a "swing man" with seniority would get a permanent route (B. A., pp. 179-180), but that in the past such an individual who had been previously employed as a swing man, but for 15 months thereafter was no longer employed by R. K., was then called in and given a permanent route (B. A., pp. 190, 192, 193-194, and esp. p. 78, fn. 22), and that Petitioner's seniority, experience, and capabilities as set up and disclosed in this record, should have given him the route which was (discriminatorily?) given to the said "swing" individual.

The reasoning of Examiner Buchanan very carefully followed the first opinion and remand of the Circuit

Court. At pp. 78-83 of the Board's Appendix herein the narrowing of the issue, the particular facts, and the inferences and reasoning are disclosed. Thus: "The procedure will thus be in accordance with the Court's decision and its indicated position. Were we to confine ourselves to 'establishment' of another route, we would be weighing what the Court declared would be too drastic a remedy. On the other hand, the modification and the remand indicate that consideration should be given to and determination made of Winzelberg's right to employment, *not by discharge of another employee on or after January 27, 1951, but by assignments in preference to another.* As we follow the seniority pattern recognized by the parties, R. K.'s employment records point to availability of a route for which Winzelberg could have bid. . . ." (B. A., pp. 79-80). (Emphasis added.) The Examiner's Supplemental Intermediate Report then examines the evidence from the point of view above set forth and concludes: "Others with less seniority than Winzelberg are now [April 11, 1955] employed as route salesmen. The job to which he has been entitled is thus a continuing one, and Winzelberg is still entitled to immediate instatement" (B. A., p. 82).

The Board agreed with this (*supra*, p. 21, B. A., p. 11, fn. 8, 2d par.) but the Circuit Court felt that on June 18th Petitioner "would have stood as a stranger to the respondent bakery, wholly without status as an employee. There was no evidence either of contract or of custom whereby for any subsequent period he would have been entitled to the status of an employee with the privileges of seniority which pertained to employees. On June 18, 1951 . . . and on

June 16, 1952 [discussed shortly], . . . he would have lacked status as an employee even if he had had temporary employment until March 10, 1951" (B. A., p. 302).

There is a simple anticipation (answer) to this argument, as well as to the later statement by the Court, "But a thorough reading of the record fails to disclose any evidence of a seniority system applicable to R. K.'s *ex*-employees [*sic*] whereby Winzelberg . . . would have been entitled to the permanent established route which then became available. And absent evidence of a seniority system enforceable by *ex*-employees [*sic*], whether Winzelberg . . . would have been subsequently employed by R. K., still remains a matter only of conjecture" (B. A., p. 303).

The answer is given by both the Trial Examiner and the Board. The former's Supplemental Intermediate Report, B. A., pp. 72-73, anticipates the Court, for there R. K.'s argument, "strenuously and repeatedly asserted," is considered. That argument is "that valid and reasonable limitations would effectively have prevented Winzelberg's employment by R. K." The answer is: "If custom or practice in the industry offered a defense to Winzelberg's claim to a job, it was properly to be raised at the earlier hearing as a sufficient defense to the allegation of discrimination. It cannot be held that he was discriminated against by the failure or refusal to put him to work and at the same time that established practice justified such failure or refusal. But the first of these propositions has already been found [and con-

curred in by the Court of Appeals]; the second must therefore fall." The Labor Board likewise anticipates the Court's second opinion when it refers to Petitioner's abiiity "to fill in for vacationing route salesmen and to perform the duties of a permanent route salesman. . . ." (B. A., p. 11, fn. 8). But the Board does two things: first, it rejects the Examiner's "statement that the law of the case precluded Respondents from relying" upon their, Respondents', offers of employment to Petitioner, for these offers were of employment "less desirable than that unlawfully denied" Petitioner; second, the Board affirmatively "find, on the basis of the evidence credited by both" Trial Examiners, that "R. K. had a vacancy" originally because of a driver's illness, that "R. K.'s President told Winzelberg that he was qualified therefor," and that the person who later was employed on June 18th to fill in for vacationing drivers, "so far as the record shows did not have Winzelberg's experience . . ." and that Winzelberg was "at least as well qualified as Greenberg [hired to fill in] to fill the jobs held by Greenberg. . . ." (B. A., p. 11, fn. 8).

c) June 16, 1952-April 2, 1955 (the third period involved). Between September 8, 1951, and June 16, 1952, there was no need for a permanent, regular route man by R. K. On June 16, 1952, however, an opening developed. It was filled by the driver R. K. had hired on June 18, 1951, to fill in for vacationers, *i. e.*, the second period. This driver had not been employed in any capacity by R. K. during the above interim between the second and the third periods. He received the job on the basis of seniority. The two Trial Examiners, and the Board, reasoned that Petitioner, who should have been employed for the second period,

would likewise have received this third-period job, and on the basis of seniority again. The facts disclosed Petitioner as being available, qualified, and eager for the job, but he was not offered it or hired. Why was Greenberg, the vacationing fill-in for the second period, hired for this third period? The Circuit Court says that, "so far as the evidence shows, [it] was due only to the fortuitous circumstance that he was available and qualified—not because of any rights of seniority entitling him to the job. Since the appointment was not sought by a present employee, the respondent employer was entitled to fill the position by anyone it chose—whether theretofore employed or not. . . ." (B. A., p. 302).

The Court paraphrases the Board's reasoning as follows: the Board says that the record now, as distinguished from the original one, "contains concrete evidence as to the incidence of turnover among R. K.'s route salesmen, and as to R. K.'s seniority practices, so that these factors bearing on Winzelberg's opportunities for advancement to a route salesman's job, absent discrimination are no longer matters of conjecture" (B. A., p. 303, and see, *supra*, p. 20). But, said the Circuit Court, "a thorough reading of the record fails to disclose any evidence of a seniority system applicable to R. K.'s *ex*-employees [*sic*]. . . ." (B. A., p. 303, see also, *supra*, p. 24).

The Court of Appeals overlooked the following pertinent and very material evidence:

1) R. K., by its President, wrote Petitioner a letter dated January 27, 1951 (B. A., pp. 121-122). The Trial Examiner asked R. K.'s attorney whether he,

the attorney, agreed with the Examiner's interpretation of the letter that it "offers Mr. Winzelberg a job as a replacement of a driver who was not going to be working for two or three months, after which Mr. Winzelberg would be used as a vacation relief man and then, after that, according to the letter, the Respondent R. K. Baking Corporation, 'would be glad to establish another route for you as I feel you are just the right man for us.' . . . That is your interpretation? Mr. Smith [attorney for R. K.]: Yes. Mr. Greenhoots [the sick driver to be replaced] . . . was out six weeks. Before the vacations would actually begin, and after the return of Mr. Greenhoots, that was a period of . . . Two months. . . . We wouldn't be able to use him" (B. A., p. 119).

2) On the remand, and during the hearing before the Trial Examiner, counsel for R. K. and the Union, as well as for the Board's General Counsel, argued the scope of the remand (B. A., pp. 125-131), and this very question of evidence to prove that Petitioner was entitled to instatement was discussed hotly. The Board's counsel agreed that "the mere fact that the man is discriminated against does not automatically entitle him to reinstatement and back pay" (B. A., p. 129). The Trial Examiner concluded the discussion with, "The nature, the extent of that remedy remains to be determined. It may well be in any given situation we might find that there is in a practical sense, no practicable remedy. That is what we are going to hear now. . . ." (B. A., p. 131).

3) On remand, R. K.'s President testified that Greenberg (who took over for the ill driver in place of Petitioner herein) "came in as a temporary replacement to replace someone who was sick on two or

three occasions where you worked a few weeks each time, and then was severed from our payroll for a very long period of time" (B. A., p. 189). R. K.'s President also testified that the procedure and custom for a driver to acquire a permanent route is "He first has to serve as a swingman or as a relief man, and he serves as such until such a time as one of the regular men either loses employment, resigns, or passes away. In that case the route is usually put up for bid and anyone of the employees that has seniority, they have a right to get that route instead of the route that they are on at the present time" (B. A., pp. 179-180). Greenberg began working for R. K. as a temporary relief man on February 7, 1951, for a driver who was ill, continued till February 17th, and on that day took over the route of the sick driver (whose position the Trial Examiner, the Board, and the Circuit Court all agree Petitioner was to get for the period of this illness). Greenberg worked till March 10, 1951, when the sick driver returned (B. A., p. 190). Thus the first period involved here, from February 7th to March 10, 1951, for which the Court of Appeals agreed Petitioner was entitled to instatement and back pay, was covered mainly by Greenberg, whose only work record for R. K. at that time was between February 7th and February 17th, when he took over as a relief for the sick driver. Greenberg's work was thus exactly what Petitioner's would have been herein, namely, a relief man for a sick driver. R. K.'s President testified, as above, that to get a permanent route a driver has to be employed first "as a swingman or as a relief driver." Admittedly, Petitioner was to be instated to the job Greenberg was given. Thus, as everyone agrees, Petitioner's

experience was as a relief driver, and at least equalled Greenberg's (but we must add Petitioner's 33 years in the industry). Between March 10, 1951, when "Greenberg was severed from employment at R. K." (B. A., p. 186), and the second period of June 18, 1951, to September 8, 1951, Greenberg admittedly did not work for R. K.; after September 8, 1951, to June 16, 1952 (the beginning of the third period), Greenberg again admittedly did not work for R. K.; on June 16, 1952, however, Greenberg, who was not then employed by R. K., was employed by them to take over for a driver who had bid in another (deceased) driver's route, thus leaving his own route open (B. A., p. 190). The following excerpt from the testimony is self-explanatory at this point:

> "Q. (By Mr. Kimmel) [Board's attorney, cross-examining R. K.'s President] When Greenberg came back to your employ, he took over a route; is that correct? A. That is so.
>
> Q. Didn't you testify before that it was the practice in your company, and indeed in the industry, that men were not taken from the outside and given routes but that, rather, swingmen then in your employ were given routes, or were given the first chance to bid on an open route; did you so testify? A. Yes, that is precisely what we did. We followed that pattern. This man had previously been employed by us. He knew our produces and he knew our methods.
>
> * * * *
>
> Q. Greenberg was not in your employ at the time that Schirloff vacated this route; is that correct? A. That is correct.

Q. Can you explain why Greenberg, who was not then in your employ, received that route rather than one of the swingmen who had bid in for the route? A. Yes. As you will recall, I testified that this here thing took place just immediately after the death of Kantor, and then we had a strike almost immediately after that and the plant was shut for two weeks. I believe we had no other swingmen available, to begin with, and secondly, nobody wanted this route because this was the poorest earning route in the company, and nobody wanted to make a sacrifice to take that. We then had to go out and get a person best qualified for the job. Greenberg was the man best qualified for it. He knew our line. We have to break in a swingman and it takes a minimum of two weeks at company cost, so that the man could be acquainted with the identification numbers of our products. We don't indicate on our boxes of cake as to what the box contains. . . ." (B. A., pp. 129-193).

4) R. K.'s President testified, as quoted above, that before a driver could bid in on a permanent route he had to serve first "as a swingman or as a relief man." The relative importance, or, rather, unimportance he attached to these positions, insofar as serving in either was a condition precedent to the bidding, is illustrated by his testimony that certain drivers who later took over permanent routes, "In some places you will see that they were vacation men, and then, maybe after the vacation period was over, they may have served a week or two weeks or three weeks as swingmen;

until we readjusted the schedule again" (B. A., pp. 195-196). Now, as to the application of seniority at this point, the same President testified that seniority controlled in getting a permanent route (quoted above at p. 28, B. A., p. 179).

5) And, on the question now of whether seniority was adhered to by R. K., its same President agreed that of the eleven regular routemen then (February 9, 1955) employed, one was still Greenberg, and one, whose name the President could not remember, did not "move from the ranks," but was "hired as a regular routeman," that he was "hired . . . from the outside. . . ." (B. A., p. 196).

Third: The conclusions of the Court of Appeals, based upon its (mis-)understanding and (mis-)application of the facts and the law, now were that [1] "at least in the setting of this case the unfair labor practice found to have occurred on January 27, 1951 has not been shown to be the proximate cause of failure to appoint Winzelberg to jobs which were not open until long after his temporary employment and his status as an employee had terminated . . . [2] The record discloses substantially the same defect of proof with respect to the Board's order of instatement. Merely because Winzelberg would have had, but for the unfair labor practice proved, six weeks of temporary employment, it does not follow that for fifteen months thereafter he had status as an employee or that he had rights of seniority entitling him to subsequent appointment to a permanent and lucrative position. . . ." (B. A., p. 303).

The short answer is: that R. K.'s President testified differently as to [1] above, and this has already

been sufficiently treated as to testimony, reasoning, and law not to require further discussion; that again R. K.'s President has testified differently as to [2] above, and again this has likewise been sufficiently treated to demonstrate the error of the Circuit Court.

C. Conclusions

The record discloses a man, with 33 years in an industry, black-listed by a Teamsters Local and losing the opportunity for a job because of an illegal union-security clause. This is conceded to be an unfair labor practice. The only question is how to effectuate the remedial purposes of the Act and to make this man, unable to get a decent job in the field, whole. The Petitioner is today, relegated to an inferior job, out of his field; for 9 years now he has sought redress; two Trial Examiners and seven Board Members agree on a remedy which has a solid basis in the testimony, and has not alone substantial evidence to support it, but reason and logic and justice. Three Judges below initially disagreed and, as we have seen, one of these plus two others unfortunately misinterpret and disregard the new facts and the changed law, and use illogical and invalid reasoning.

What the testimony discloses, that the Teamsters will spill pints of blood in this case to prevent Petitioner from getting a job in the industry, is being accomplished through judicial misinterpretation and error.

It is respectfully submitted that equity and justice, besides facts, law, logic, and reason, cry aloud for this petition to be granted.

The writ should run with respect to the three questions presented.

Respectfully submitted,

MORRIS D. FORKOSCH
375 Pearl Street
Brooklyn 1, N. Y.
Counsel for Petitioner

Dated: Brooklyn, N. Y.
April 22, 1960

APPENDIX

Excerpt from Opinions

This appendix contains the first opinion of the Court of Appeals for the Second Circuit in this matter. The opinion is entitled "National Labor Relations Board v. Gottfried Baking Co., Inc., et al." and is found in 210 F. 2d 772, dated February 15, 1954, and modified on a petition for rehearing dated May 15, 1954.

The Court's opinion is a lengthy one which takes up and decides questions extraneous to the questions involved in this petition for certiorari. These extraneous questions relate to the jurisdiction of the Board because R. K. is alleged not to be engaged in interstate commerce, whether the preferential hiring clauses in the contracts were illegal, whether a "saving clause" took them out of this area of illegality, whether the Gottfried contract was terminated before the discrimination involved herein occurred, whether the six-months short statute of limitations for charges is applicable herein, and the discrimination itself.

The only matter material and pertinent to this petition for a writ of certiorari is found in the last two paragraphs of the opinion, which paragraphs follow in full:

> Affirmatively, the Board ordered R. K. to offer Winzelberg immediate employment as route salesman, and ordered the Union to withdraw its objection to Winzelberg's employment by R. K., to so notify R. K. in writing, and to notify Winzelberg in writing that such withdrawal has been effected. The Board's order further required

that R. K. and the Union jointly and severally make Winzelberg whole for the loss of earnings incurred by the discrimination against him.

On Petition for Rehearing

MEDINA, *Circuit Judge.*

We shall suspend passing upon that part of the order described in the preceding paragraph and remand the case to the Board for the purpose of hearing and determining the matter of the respondents' specific obligatitons under the "reinstatement" and back pay provisions of its order. In all other respects, the Board's order will be enforced.

Decree Enforcing in Part and Denying in Part an Order of the National Labor Relations Board

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

R. K. BAKING CORPORATION, AND BAKERY AND PASTRY DRIVERS AND HELPERS UNION, LOCAL NO. 802, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

Before: CLARK, HINCKS and WATERMAN, *Circuit Judges.*

This Court of September 10, 1954, entered its decree enforcing the Board's order of March 3, 1953 against these respondents, except as to the reinstatement and reimbursement provisions of the order which were remanded to the Board for the purpose of hearing and determination of the specific obligation of Respondents R. K. Baking Corporation (hereinafter called R K) and Bakery and Pastry Drivers and Helpers Union, Local No. 802, IBTCWHA (hereinafter called the Union) under that portion of the Board's said order which requires R K to offer Max Winzelberg immediate employment as route salesman, and requires that Respondents R K and the Union jointly and severally make Winzelberg whole for the

Decree Enforcing in Part and Denying in Part an Order of the National Labor Relations Board

loss of earnings incurred because of the discrimination practiced against him. The Board having on March 20, 1959, petitioned this Court for enforcement of its supplemental order of May 6, 1958, as modified after proceeding pursuant to that remand, and the Court having heard argument of respective counsel on November 6, 1959 and being fully advised in the premises, on December 24, 1959, handed down its opinion enforcing in part and denying in part the supplemental order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Second Circuit that the Respondent R K Baking Corporation and the Respondent Bakery & Pastry Drivers and Helpers Union, Local No. 802, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and their respective officers, agents, successors, and assigns, shall jointly and severally make Max Winzelberg whole for the loss of earnings he has suffered because of the discrimination against him, which loss of earnings amounts to $696.36. If possible, one-half of such back pay shall be paid by Respondent Union.

CHARLES E. CLARK
Judge, United States Court of
Appeals for the Second Circuit

Filed: January 27, 1960

CARROLL C. HINCKS
Judge, United States Court of
Appeals for the Second Circuit

FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 18 1960
JAMES R. BROWNING, Clerk

No. 882

In the Supreme Court of the United States

OCTOBER TERM, 1959

MAX WINZELBERG, PETITIONER

v.

R. K. BAKING CORPORATION, and BAKERY AND PASTRY DRIVERS AND HELPERS UNION, LOCAL NO. 802, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

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National Labor Relations Board,
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

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MAX WINZELBERG, PETITIONER

v.

R. K. BAKING CORPORATION, and BAKERY AND PASTRY DRIVERS AND HELPERS UNION, LOCAL NO. 802, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

In an unfair labor practice proceeding initiated by charges filed by petitioner, the Board found that R. K. Baking Corp. and Teamsters' Local 802, respondents herein, had violated the National Labor Relations Act by entering into a closed-shop contract and by denying available employment to petitioner pursuant thereto. The Board's order required re-

spondents to cease and desist from the unfair labor practices found, to offer petitioner employment, and to reimburse him for earnings lost as a result of the illegal discrimination practiced against him. The court of appeals enforced the order except for the employment and back-pay provisions, which it remanded to the Board for a determination of respondents' specific obligations thereunder (Pet. 1a-2a). In supplemental proceedings, the Board found that, but for the unlawful discrimination, petitioner would have been employed by the Company, not only for the temporary job which he was actually denied, but for two subsequent jobs which opened up at intervals thereafter, and, on this basis, computed the amount of back pay to be $12,438.11. The court of appeals, however, concluded that the evidence did not support the Board's finding that the Company would have been obligated by its initial employment of petitioner to offer him jobs subsequently available (Pet. App. 3-4). Accordingly, it enforced the Board's supplemental order only to the extent of $696.36, the amount of back pay for the job available at the time of the refusal to hire.

By this petition, petitioner seeks to have this Court review the action of the court of appeals in reducing the amount of back pay ordered by the Board. The Board itself has decided not to seek certiorari since it views the adverse decision of the court of appeals as turning upon its differing appraisal of the evidence concerning the probable course of petitioner's employment with the Company absent the discrimination. See *Universal Camera Corp.* v. *National Labor*

Relations Board, 340 U.S. 474, 490-491. As we now show, it does not appear that petitioner has standing to obtain review of the court of appeals' decision.

Petitioner was not a party to the proceedings in the court of appeals, which were brought by the Board against the Union and the Company. Nor did he seek to intervene to become a party in such proceedings. The statute under which petitioner seeks to invoke the jurisdiction of this Court, 28 U.S.C. 1254(1), provides for the granting of a writ only "* * * upon the petition of any party to any civil * * * case * * *." And this limitation of the right of review to named parties is consistent with the principle that "[o]ne who is not a party to a record and judgment is not entitled to appeal therefrom." *Ex Parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581; *Louisiana* v. *Jack*, 244 U.S. 397, 402; cf. *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, 337, 338-339; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 218.

Nor did petitioner automatically acquire a party status in the court of appeals by virtue of the fact that he was the charging party before the Board and is the ultimate beneficiary of the Board's back-pay order. See *Aluminum Ore Co.* v. *National Labor Relations Board*, 131 F. 2d 485, 488 (C.A. 7). "A charge of an unfair labor practice may be presented to the Board, but the person or group making the charges does not become the actor in the proceeding." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 264-265. The Board, acting "in

the public interest" and not to vindicate private rights, is entrusted with the sole responsibility for "the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief." Moreover, when "the Board has made its order, the Board alone is authorized to take proceedings to enforce it." *Id.* at 265. Similarly, the "award of back pay is not a private judgment or a chose in action belonging to the employee, and he has no property right in the award pending his actual receipt of it." *National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F. 2d 757, 761 (C.A. 9); see also *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. 2d 146, 151 (C.A. 5).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel

NORTON J. COME,
Assistant General Counsel,

STANDAU E. WEINBRECHT,
Attorney,
National Labor Relations Board.

MAY 1960.

APPENDIX

R. K. Baking Corp., et al

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 41—October Term, 1959

(Argued November 6, 1959
Decided December 24, 1959.)

Docket No. 25576

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

R. K. BAKING CORPORATION, and BAKERY AND PASTRY DRIVERS AND HELPERS UNION, LOCAL NO. 802, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

Before:

CLARK, HINCKS and WATERMAN,
Circuit Judges.

The National Labor Relations Board petitions for enforcement of its order directing the respondent R. K. Baking Corporation to offer one Max Winzelberg immediate employment as route salesman, and

requiring the respondents jointly and severally to pay Winzelberg the sum of $12,438.11 for loss of earnings incurred because of discrimination practiced against him. 120 N.L.R.B. No. 101.

Enforcement granted in part: in part denied.

STANDAU E. WEINBRECHT, Atty., National Labor Relations Board, Washington, D. C. (Jerome D. Fenton, Gen. Counsel, Thomas J. McDermott, Assoc. Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Owsley Vose, Atty., N. L. R. B., Washington, D. C. on the brief), *for petitioner.*

MURRAY RAFSKY, New York, N. Y. (Smith & Rafsky, New York, N. Y., on the brief), *for respondent R. K. Baking Corporation.*

STANLEY B. BLUMBERG, New York, N. Y. (Cohen & Weiss, and Henry Weiss, New York, N. Y., on the brief), *for respondent Bakery and Pastry Drivers and Helpers Union, Local No. 802, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.*

HINCKS, *Circuit Judge:*

The National Labor Relations Board petitions for enforcement of its supplemental order requiring the R. K. Baking Corp., hereinafter referred to as "R. K.," to offer Max Winzelberg, the charging party, immediate and permanent employment as a bakery

route salesman and to pay him a $12,438.11 back pay award, the payment to be made jointly and severally with the Bakery and Pastry Drivers and Helpers Union, Local No. 802, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, hereinafter referred to as the "Union." On a prior petition by the Board, *N. L. R. B.* v. *Gottfried Baking Co., et al.*, 2 Cir., 210 F. 2d 772, we granted enforcement of the Board's order in so far as based on findings that R. K. had violated Section 8(a)(1) and (3) of the Act, 29 U. S. C. A. § 158(a)(1) and (3), by discriminatorily refusing temporary employment to Winzelberg, and that the Union, by causing such discrimination, had violated Section 8(b)(1)(A) and (2), 29 U. S. C. A. §158(b)(1)(A) and (2). However, on the Board's petition for rehearing, instead of passing upon the remedies of instatement and back pay as proposed by the Board, we remanded for further Board hearings on the "respondents' specific obligations under the 'reinstatement' and back pay provisions of its order." Upon such remand the Trial Examiner, by a report dated April 11, 1955, found Winzelberg entitled to the relief herein petitioned for, as above stated. Thereafter, the Board, because of belated representations of fraud, on its own motion requested this court to expand the scope of the remand to include investigation and findings as to the authenticity and *bona fides* of Winzelberg's application for employment, and R. K.'s refusal thereof. This motion we granted on November 30, 1955.

At the rehearing, Charles Gottfried, R. K.'s president, testified that he had previously withheld the true nature of the correspondence which made up the

application for, and illegal refusal of, employment.[1]

---

[1] [Winzelberg's letter of January 25, 1951 to R. K.]

"Dear Sir,

I am applying for a position of route salesman with your firm. It has come to my attention that you have a position open at this time, due to a salesman's illness.

I have worked for many years with a wholesale bakery, and will furnish references if required. I worked for the Gottfried Baking Co., and am considered one of the top men in the line.

Kindly advise when I can see you for an interview.

Yours truly,

MAX WINZELBERG"

[R. K.'s reply of January 27, 1951]

"Dear Max:

I have your most welcome letter of January 25. Frankly I could use a man of your qualification as a replacement even if only temporary to take over Artie Greenhoots route. He may be out for two or three months and by the time he returns I could use you as a vacation relief man. When this is over we would be glad to establish another route for you as I feel you are just the right man for us. We have had a lot of difficulty in getting replacements from the union. The last experience cost us a fortune and the union has no qualified replacements.

I know you are marked lousy at the union because of your situation at Gottfrieds. I am very anxious to put you to work immediately but I cannot get involved in a fight with Local 802 on your account.

I would suggest that you go to Local 802 and try to straighten yourself out with them and get 'a Union Book.'

If you do this I will p you right to work.

Very truly yours,

R. K. BAKING CORP.
Charles Gottfried,
President."

He stated that these letters had been part of a fraudulent plan of his, in which Winzelberg joined, to injure and embarrass Maurice Gottfried, his brother, by establishing an unfair labor practice against his brother's firm, the Gottfried Baking Company. Although the Examiner found both witnesses unreliable at different stages of the hearing, he accepted Winzelberg's testimony that no collusive plan existed and that the letters were, in fact, *bona fide*. Charles Gottfried's story was rejected as implausible on its face, especially in view of Gottfried's unexplained and "incredible" statement that he intended his letter of January 27, 1951 to injure his brother's firm and that he did not realize that it would establish a violation of the Act by R. K., his own firm. While the letters are not free from a ring of contrivancy and artificiality, particularly in view of Gottfried's long standing acquaintance with Winzelberg, it was certainly more reasonable to assume that Winzelberg hoped for, and received, concrete evidence of an unfair labor practice in the rejection by R.K. of his *bona fide* job application, see *N. L. R. B.* v. *Swinerton*, 9 Cir., 202 F. 2d 511, 515, than to accept Gottfried's explanation of the fraudulent conception of the letters. Accordingly, we hold that nothing in the hearings on remand disturbs our earlier conclusions of an unfair labor practice effectuated by R. K.'s letter of January 27, 1951 and caused by the Union. Notwithstanding the contrary arguments advanced by the respondents, the resolution of this question turned largely upon the Examiner's appraisal of the credibility of the two witnesses and his finding is not in direct contradiction of the undisputed facts and the substantial evidence on the whole record. *N. L. R. B.* v. *James Thompson & Co.*, 2 Cir., 208 F. 2d 743; *N. L. R. B.* v. *Dinion Coil Co.*, 2 Cir., 201 F. 2d 484.

The facts upon which the Board ordered instatement to a permanent position and back pay of upwards of $12,000 were as follows. But for the initial discrimination Winzelberg would have been temporarily employed as a replacement for a sick driver from January 27, 1951 to March 10, 1951 and on the basis of the weekly average earnings of the sick driver would have earned $696.36 during this six weeks' period. The Board further found that, under the seniority system prevailing at R. K., Winzelberg, had he been employed as a temporary replacement worker on January 27, 1951, would have had first choice at employment as a vacation relief driver, and that he would have worked at such job from June 18, 1951, when the first opening for a vacation relief man occurred, through September 8, 1951. For this period he was credited with back pay of $1,312.87, an amount equal to the actual earnings of the senior relief driver during that period. The Board then found that, but for the initial discrimination and on the assumption that he would have successively accepted employment as aforesaid as a temporary substitute and a vacation relief man, Winzelberg would have achieved a seniority which would have entitled him to assignment to a permanent route on June 16, 1952, which was the date of the first hiring of a permanent route man by R. K. subsequent to January 27, 1951. This assignment in fact went to one Greenberg on the basis of prior employment by R. K. as a temporary relief man from February 7, 1951 to March 10, 1951. Finding that Greenberg had been continuously employed by R. K. as a regular route salesman on successive routes until April 2, 1955, the date to which employment and back pay

liability had been computed,[2] the Board determined that Winzelberg's wage loss during that period would have been $13,879.88, a projection of Greenberg's average weekly earnings for that period minus a 13 week period when Winzelberg had been ill. By deducting Winzelberg's actual interim earnings ($3,451.00) from his gross wage loss ($15,889.11) computed as shown above, the Board reached its conclusion that Winzelberg was entitled to $12,438.11 in back pay.

We think, however, that we may not properly enforce the Board's "instatement" order and that the back pay award may be enforced only in part, since the evidence fails to show that these drastic remedies as applied in favor of this complainant, who never was an employee of the respondent, are necessary to make him whole for the discrimination practiced against him in refusing employment. Cf. *Republic Steel Corporation* v. *N. L. R. B.*, 311 U.S. 7; *N. L. R. B.* v. *Remington Rand, Inc.*, 2 Cir., 94 F. 2d 862, 872.

We agree with the Board that for the period from January 27, 1951 to March 10, 1951 Winzelberg was properly awarded back pay in the amount of $696.36. The evidence plainly showed that such an award constitutes no more than fair compensation for temporary employment in a job which was then available but which was wrongfully withheld from him because of the unfair labor practice which had been proved. The Board recognized that such an award would be proper only on proof that Winzelberg had with reasonable diligence sought employment elsewhere and

[2] The hearing on remand was concluded on March 23, 1955 and the Examiner's supplemental report was dated April 11, 1955.

evidence of such effort, especially during this period, is scant indeed. However, the evidence was sufficient, we think, to sustain the Board's finding on this prerequisite to an award.

But even if Winzelberg had been given this temporary employment, subsequent to its termination on March 10, 1951 he would have stood as a stranger to the respondent bakery, wholly without status as an employee. There was no evidence either of contract or of custom whereby for any subsequent period he would have been entitled to the status of an employee with the privileges of seniority which pertained to employees. On June 18, 1951, when the first opening for a vacation relief man occurred, and on June 16, 1952, some fifteen months after his status as a temporary employee would have terminated when the first opening as a permanent route man occurred, he would have lacked status as an employee even if he had had temporary employment until March 10, 1951.

To be sure, Greenberg, who had temporary employment from February 7, 1951 to March 10, 1951, was given permanent employment as a route man on June 16, 1952 to fill a vacancy then occurring. But this appointment, so far as the evidence shows, was due only to the fortuitous circumstance that he was available and qualified—not because of any rights of seniority entitling him to the job. Since the appointment was not sought by a present employee, the respondent employer was entitled to fill the position by anyone it chose—whether theretofore employed or not. The Board reasoned that the record now, as distinguished from its content as of the time of our initial opinion, "contains concrete evidence as to the incidence of turnover among R. K.'s route salesmen, and as to R. K.'s seniority practices, so that these

factors bearing on Winzelberg's opportunities for advancement to a route salesman's job, absent discrimination, are no longer matters of conjecture." But a thorough reading of the record fails to disclose any evidence of a seniority system applicable to R. K.'s *ex*-employees whereby Winzelberg, who concededly, even absent all discrimination, would not have been employed by R. K. for the year prior to June 1952, would have been entitled to the permanent established route which then became available. And absent evidence of a seniority system enforceable by *ex*-employees, whether Winzelberg, but for the refusal of the temporary job which in fact expired on March 10, 1951, would have been subsequently employed by R. K., still remains a matter only of conjecture.

We hold, therefore, that at least in the setting of this case the unfair labor practice found to have occurred on January 27, 1951 has not been shown to be the proximate cause of failure to appoint Winzelberg to jobs which were not open until long after his temporary employment and his status as an employee had terminated. Accordingly, we grant enforcement to the Board's order for back pay to the extent that it awards back pay of $696.36 and no further.

The record discloses substantially the same defect of proof with respect to the Board's order of instatement. Merely because Winzelberg would have had, but for the unfair labor practice proved, six weeks of temporary employment, it does not follow that for fifteen months thereafter he had status as an employee or that he had rights of seniority entitling him to subsequent appointment to a permanent and lucrative position. Whether or not another unfair labor practice occurred on June 16, 1952 when a permanent job first became available, to which Winzelberg was not appointed, is a question never

charged, never passed upon by the Board and not now before us. We conclude that R. K. may not now be ordered either to discharge Greenberg or to create a new route, not shown to be needed, in order to make room for Winzelberg. We hold that the instatement provision of the order should not be enforced.

To the extent indicated in the foregoing opinion, enforcement is granted: in all other respects enforcement is denied.

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Supreme Court of the United States

October Term, 1959

No. 882

MAX WINZELBERG, an Individual,
Petitioner,

v.

R. K. BAKING CORP. and BAKERY & PASTRY DRIVERS AND HELPERS UNION, LOCAL NO. 802, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents,

and

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

R. K. Baking Corp., named Respondent in a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by one Max Winzelberg, hereby enters its opposition to said Petition and respectfully prays that the Petition for a Writ of Certiorari be denied for the reasons set forth below.

Questions Presented

1. Does an individual who originally filed unfair labor practice charges with the National Labor Relations Board but was not, under the statutory scheme of the National Labor Relations Act, a party to enforcement proceedings in the Court of Appeals, have standing to petition for a Writ of Certiorari?

2. Does the decision below involve any conflict with decisions of other Courts of Appeals; or pose an important question of federal law; or conflict with applicable decisions of this Court so as to justify review by this Court?

3. Does the decision below so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision?

Statement

This litigation was commenced by Petitioner's filing of unfair labor practice charges against Respondent R. K. Baking Corp. and Respondent Local 802, International Brotherhood of Teamsters. After hearing a Trial Examiner issued a decision finding *inter alia* that the Respondents had violated the National Labor Relations Act by discriminatorily denying employment to Petitioner because of his lack of good-standing membership in Respondent union. These findings were subsequently appealed to the National Labor Relations Board, which upheld the findings.

The case was then brought before the Court of Appeals for the Second Circuit which upheld the Board's findings of discrimination, but overruled the Board's affirmative order insofar as it directed that the company offer a job to Petitioner and pay him back pay. The Board then petitioned for rehearing on the question of affirmative remedy, which the Court of Appeals granted by remanding the case to the Board for the purpose of determining what obligation, if any, the Respondents had toward Petitioner insofar as a job offer and back pay were concerned.

Thereafter, pursuant to this remand, a second hearing was commenced before a Trial Examiner who decided that Petitioner should be offered employment and paid back pay in the sum of $12,438.11. While an appeal on this decision was pending before the Board, the Board itself

again petitioned the Court of Appeals to enlarge the scope of the Court's previous remand order so as to permit the receipt of evidence on the issue of whether the original application for employment by Petitioner was really *bona fide* or was fraudulent in nature. The Court granted this enlargement.

A third hearing was then convened before a Trial Examiner who ruled against the allegations of fraud and recommended affirmance of the original decision of the Board. On appeal, the Board reaffirmed its original Order and directed the Respondent Company to offer Petitioner employment as a permanent route salesman and to pay him back wages in the sum of $12,438.11.

The Board again filed a Petition for Enforcement of this Order in the Court of Appeals. Named therein as parties was the National Labor Relations Board as Petitioner, and R. K. Baking Corp. and Local 802, International Brotherhood of Teamsters as Respondent. On December 24, 1959, the Court of Appeals rendered its decision from which this Petition for a Writ of Certiorari seeks review. In its decision, the Court again upheld the Board's findings of discrimination and affirmed the finding of lack of fraud in the original job application by Petitioner. The Court held, however, that the evidence did not warrant enforcement of the Board's order insofar as it directed the company to offer Petitioner permanent employment as a route salesman. Accordingly, the Court reduced the back pay award to the sum of $696.36, which represents the amount Petitioner would have earned had he been employed as a temporary replacement for six weeks in February and March of 1951. This sum of $696.36 has been paid to and received and accepted by the Enforcement Division of the National Labor Relations Board. It was for this job of temporary replacement that Petitioner originally applied, and it was this job which the Court held had been denied Petitioner because of his lack of good-standing membership in the Respondent Union.

ARGUMENT

I. Petitioner has no standing to file the instant Petition for a Writ of Certiorari.

The statutory scheme established by the National Labor Relations Act provides for public enforcement of the rights guaranteed workers, unions and employers therein. In this scheme, the Board is without authority to act unless and until charges of unfair labor practices are presented to it by the filing of a charge by an employee, union or employer. Thereafter, all procedural steps undertaken are directed and controlled by the Board alone. The first step following the filing of the charge is for the Board to conduct an investigation in order to determine whether there is any merit to the allegations of the charge. If the Board after due investigation determines there is no merit to the charge, the Board has the right to dismiss. Although N. L. R. B. procedure permits an administrative appeal from such dismissal to the General Counsel of the Board (Sec. 102.19, Rules and Regulations, National Labor Relations Board) there can be no court review from the Board's action in dismissing a charge. *Lincourt* v. *NLRB*, 170 F. 2d 306 (C. A. 1).

On the other hand, should the Board after its investigation determine that unfair labor practices have probably been committed, it is entrusted by the Statute (Sec. 10(b)), to institute formal proceedings against the company and/or union who appear to have violated the law. It should be noted that these formal proceedings are directed and controlled by various arms of the National Labor Relations Board. The formal complaint is issued by the General Counsel of the National Labor Relations Board and he has responsibility to prosecute the case before a Trial Examiner of the Board and then to the Board itself, if necessary. Thereafter, should the Board issue an affirmative order with which the respondents therein fail to comply, the Board

under Sec. 10(e) of the Act, has authority to petition a Court of Appeals for enforcement of its order. The Board is also given the power to insure compliance with an enforcement order of a Court of Appeals by instituting a contempt action against a non-complying Respondent.

In each of these various procedural steps, it is the Board as a public body which alone is given the authority to enforce the provisions of the National Labor Relations Act. The sole role played by a private party is to commence a Board investigation by the filing of unfair labor practice charges.

This Court and the Courts of Appeals for the various circuits have zealously protected this public character of the enforcement of the National Labor Relations Act. Thus, in *Amalgamated Utility Workers* v. *Consolidated Edison Co. of New York*, 309 U. S. 261, the Court denied the right of the union, who had originally filed the unfair labor practice charges, to institute contempt action against the Respondent employer for its alleged non-compliance with an enforcement order of the Court of Appeals. In so ruling, the Court observed at page 266 of its opinion that:

> "When the Board has made its order, the Board alone is authorized to take proceedings to enforce it * * * The Act gives no authority for any proceeding by a private person * * * to secure enforcement of the Board's order. The vindication of the desired freedom of employees is thus confided by the Act, by reason of the recognized public interest, to the public agency the Act creates."

Recognizing the public character of the rights created by the National Labor Relations Act, the Courts of Appeals have generally denied charging parties the right to petition for enforcement of a Board order, *Newspaper Publishers Assn.* v. *NLRB*, 190 F. 2d 45 (C. A. 7) and generally have not even permitted them to intervene in enforcement proceedings before the Court. *Haleston Drug Stores, Inc.* v.

NLRB, 190 F. 2d 1022 (C. A. 9); *Aluminum Ore Co.* v. *NLRB*, 131 F. 2d 485 (C. A. 7); *Stewart Ore Casting Corp.* v. *NLRB*, 132 F. 2d 801 (C. A. 7).[1]

The statute establishes only one exception to this general rule that all procedural steps after the filing of the charge are within the sole domain of the Board. Section 10(f) of the Act affords to the party filing the charge the right to obtain a review by a Court of Appeals of a decision of the Board adverse to him. However, the type of Board decision envisaged by this provision is a final decision after the issuance of a complaint and formal hearing. *Albrecht* v. *NLRB*, 181 F. 2d 481 (C. A. 7); *Kovach* v. *NLRB*, 229 F. 2d 138 (C. A. 7). Obviously the instant case does not fall within this one exception because Petitioner has not been aggrieved by an adverse decision against him by the Board but on the contrary, the Board through its own findings and appellate procedure before the Court of Appeals repeatedly has supported Petitioner's claims and desires. There can scarcely here be a showing that the Board has failed to carry out its full responsibilities, necessitating the seeking by a private party of review by a Court of Appeals, nor can one in the position of Petitioner who wishes the favorable decision of the Board to be reinstated, claim in any way that this decision is adverse to him. Accordingly, Petitioner's situation does not qualify for the one statutory exception noted *supra*.

---

[1] Cf. *International Union* v. *Eagle Pitcher Mining & Smelting Co. and NLRB*, 325 U. S. 335. In that case this Court permitted the union who had originally filed charges to petition for certiorari in order to review the refusal of the Court of Appeals to remand the case for further proceedings to the Board. In that case, however, the union had been permitted to intervene in the Court of Appeals as a party. Furthermore, in any event, the Board appeared (although as a party Respondent) in support of the union's petition for certiorari. The public interest, accordingly, did correspond to the union's individual interest.

In all of the many procedural steps in this case as outlined *supra*, the Petitioner was never a party as such. At all stages his case was presented by attorneys for the Labor Board. Significantly, in the enforcement proceedings below, which brought the case on four separate occasions before the Court of Appeals, the Petitioner was not named as a party. Nor did Petitioner make any effort to intervene in any of these proceedings before the Court of Appeals. The Petitioner was content to put his claim in the Board's hands just as the statute provided. The Board, of course, pursued this case in vindication of the public rights involved. Concomitantly, Petitioner's rights of a private nature were affected. Now that these private rights have been threatened by the changed remedy provided by the Court of Appeals differing from the remedy determined by the Board, Petitioner now seeks judicial status to pursue his private claims irrespective of the fact that all public rights, with which the Act is concerned, have been protected and supported by the Court of Appeals' decision.

To permit Petitioner to maintain this Petition for a Writ of Certiorari at this stage in the proceedings would, in effect, override the Board's position as prosecutor of the public rights protected by the Act. If, as appears likely at this time, the Board in its wisdom decides to take no part in petitioning for a Writ of Certiorari in this case, such inaction must be construed as arising from at least two or more of the following reasons: there is no question here suitable for review by this Court (as we shall show *infra*) and the public rights arising in this case have been faithfully vindicated by the Court of Appeals, even though its remedy curtailed the private monetary disbursement ordered. Because of these reasons, the Board should properly call a halt to this lengthy action. To allow Petitioner to carry on in the face of the Board's silence would be tantamount by this Court to notifying the Board that it should not heed its own discretion and intelligence in closing a case when it has come to a successful conclusion from the

public viewpoint, and that if the Board does recognize the advisability of resting after a differing decision from an appellate court, this Court will subvert the Board's control by allowing a private party to proceed alone. Such result was never intended by Congress and should not be countenanced by this Court.

II. The decision of the Court of Appeals below does not conflict with decisions of other Courts of Appeals, does not pose an important question of federal law or conflict with other applicable decisions of this Court so as to justify review by this Court.

As the detailed and voluminous Petition for the Writ of Certiorari amply reveals, this case is entirely factual in nature. There is no issue of law or interpretation of the statute involved.

The applicable law is hornbook clear and not in dispute. Indeed at no time during this lengthy litigation was there ever any real legal issue involved. The only questions ever presented by this case at any stage are: (1) was Petitioner discriminatorily denied employment because of his lack of good standing membership in the union; (2) is Petitioner entitled to employment as a route salesman; and (3) how much back pay is Petitioner entitled to.

The first of these questions has been decided in the affirmative on two separate occasions by the Court of Appeals and is not in dispute here. The remaining two questions hardly raise a constitutional question or even any legal issue which should be considered by this Court. All that we have in this case at this point is whether one single individual is entitled to back pay in the sum of $696.36 or in the sum of $12,438.11, and whether this individual originally applied for a temporary or permanent position.

These factual issues have already been exhaustively considered by three Trial Examiners and by the Board and the Court of Appeals on two separate occasions. It has never been the position of this Court—fortunately for this and all other cases—that the interest of the country would be enhanced by a further intensive review of factual details in civil and administrative cases particularly by this Court after such thorough review below.

All litigation must ultimately be placed to rest and this case after ten years of existence is no exception.

III. The decision of the Court of Appeals below does not depart from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision.

We think it clear that Petitioner has had his full day in court; indeed, he has had many full days in many "courts" in this case. At all stages his rights were certainly fully protected and zealously advanced by the Board.

The fact that the Court below differed in part as to the remedy ordered by the Board hardly constitutes a significant departure from the usual and accepted course of judicial proceedings so as to require the intervention of this Court. The Board, in brief, based its remedy on the finding that Petitioner had applied for a temporary job, and inferred therefrom that had Petitioner been granted that job, permanent employment would have followed. The Court of Appeals accepted the Board's findings on the extent of Petitioner's application but from the total record, was unable to draw the same inference therefrom that Petitioner would have been permanently employed after the temporary stint. Accordingly, the Court below did not arbitrarily or capriciously ignore any findings of the Board, as contended by Petitioner; on the contrary it supported these findings but found insubstantial evidence as a basis for the Board's

inference from these findings. This decision is clearly within the prerogative and responsibility of an appellate court and exemplifies no improper deviation deserving Supreme Court review.

CONCLUSION

For these reasons, on the law and without argument on the merits of the factual issues, we request respectfully that the Petition for a Writ of Certiorari be denied herein.

Respectfully submitted,

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Dated: New York, New York,
May 18, 1960.

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Respondents,

and

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Bakery and Pastry Drivers and Helpers Union, Local No. 802, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, one of the Respondents named herein respectfully submits this brief in opposition to the petition for a writ of certiorari.

Reasons for Denying the Writ and Arguments Thereon

A. Petitioner was not a party in the Court of Appeals.

The Petitioner has invoked the jurisdiction of this Court under 62 Stat. 928, 28 U. S. C. § 1254 (1), pursuant to 49 Stat. 453, 29 U. S. C. § 160 (e), as amended (petition, p. 3).

Such jurisdiction does not exist by reason of the fact that the Petitioner was not a party to the suit below and thus may not seek a writ of certiorari.

Section 1254 of title 28, in pertinent part, provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

The limitation imposed by this statutory language is explicit and its application has been uniform. This Court has declared it to be a cardinal requirement that one invoking the appellate jurisdiction of the Supreme Court to review a decision of a lower court shall establish his status as a party to the record and judgment in the court below. This is true in respect both to applications for certiorari and appeals.

Posner v. *Anderson*, 293 U. S. 53;
Industrial Commissioner of New York v. *Irving Trust Co.*, 286 U. S. 543;
In the Matter of Leaf Tobacco Board of Trade, 222 U. S. 578;
Indiana Southern R. Co. v. *Liverpool, L and G Ins. Co.*, 109 U. S. 168;
Ex Parte Cockcroft, 104 U. S. 578;
Payne v. *Miles*, 20 How. 219;
Baya'd v. *Lombard*, 9 How. 530.

The Board, on March 20, 1959, petitioned the Court of Appeals for enforcement of its order of May 6, 1958 against Respondent R. K. Baking Corporation (hereinafter called "R. K.") and Respondent Bakery and Pastry Drivers and Helpers Union, Local No. 802, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called the "Union"). The petition

was duly docketed as No. 25576. R. K. and the Union, the respondents named in the petition, each duly filed an answer to the petition. Subsequently, the Board as Petitioner, R. K. and the Union as Respondents, each submitted briefs to the Court of Appeals. On November 6, 1959, the Court of Appeals heard oral argument of counsel for the Board, R. K. and the Union.

The Petitioner, Max Winzelberg, did not appear at any stage of the proceedings before the Court of Appeals as petitioner, respondent, intervenor or in any capacity.

It is to be noted that the instant petition does not contain an assertion that Winzelberg was a party to the suit for enforcement. The best that Petitioner can do is identify himself as the complainant in the administrative proceeding before the Board. The requirement that the Petitioner for a writ of certiorari be a party is not satisfied thereby.

B. Only the National Labor Relations Board may seek and pursue the enforcement of its order.

It is clear from the petition herein that the Petitioner is in essence seeking to enforce an order of the Board (Petition, p. 12). He has no right to do so and therefore this petition must be denied.

The right to seek court enforcement exists only in the Board. In proceedings to enforce its orders, the Board acts in the public interest and not in the interest of adjudicating private rights. For this reason, individuals who may be beneficiaries under the provisions of a Board order have no enforcement rights. *Amalgamated Utility Workers* v. *Consolidated Edison Co. of New York, Inc.*, 309 U. S. 261; *Amalgamated Meat Cutters* v. *N. L. R. B.*, 267 F. 2d 169.

This Court, by its holding in the *Amalgamated Utility Workers* case, *supra*, has precluded all persons, other than

the Board, from enforcing in any manner the Board's order. Thus, in 309 U. S. at pages 265-6, the Court stated:

> "When the Board has made its order, the Board alone is authorized to take proceedings to enforce it * * * Again, the Act gives no authority for any proceeding by a private person or group, or by any employee or group of employees, to secure enforcement of the Board's order. The vindication of the desired freedom of employees is thus confided by the Act, by reason of the recognized public interest, to the public agency the Act creates * * *"

The Board has not sought a writ of certiorari in this case. It has accepted the decree of the Court of Appeals for the Second Circuit as the final adjudication of the enforcement proceedings. As the Act vests in the Board full power, authority and discretion with regard to the enforcement of its orders, the Petitioner is barred from seeking enforcement of the Board's order by the instant petition.

C. The granting of certiorari is not warranted.

While it is true that this Court may grant a writ of certiorari in a case "where a court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision" (Revised Rules of the Supreme Court of the United States, Rule 19(1)(b)), it is clear from the record that, contrary to Petitioner's assertions, this is not such a case. The Court of Appeals in denying in part, while enforcing in part, the order of the Board, properly exercised its power of review as established by the Labor Management Relations Act and defined by this Court.

The Act provides that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive". However, it is settled doctrine that the reviewing court may set aside or modify a Board decision in the absence of evidence supporting that decision. *Universal*

Camera Corporation v. *N. L. R. B.*, 340 U. S. 474; *N. L. R. B.* v. *Pittsburgh Steamship Company*, 340 U. S. 498.

The Court of Appeals, in its opinion dated December 24, 1959, stated that a thorough reading of the record failed to disclose any evidence which would support those portions of the Board's order to which the Court denied enforcement. (Board's Appendix, pp. 296-303).

It is the Court of Appeals which is charged with the normal and primary responsibility for granting or denying enforcement of Board orders. This Court will not "review a conflict of evidence nor reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way". *N. L. R. B.* v. *Pittsburgh Steamship Co., supra.*

The record presented to this Court does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 882

MAX WINZELBERG, an Individual,
Petitioner,

v.

R. K. BAKING CORP., and BAKERY & PASTRY DRIVERS AND HELPERS UNION, LOCAL NO. 802, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents,

and

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER TO THREE OPPOSITION BRIEFS OF RESPONDENTS

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OCTOBER TERM, 1959

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MAX WINZELBERG, an Individual,
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R. K. BAKING CORP., et al.,
Respondents.

REPLY BRIEF OF PETITIONER TO THREE OPPOSITION BRIEFS OF RESPONDENTS

The main, if not the only, objection voiced by the opposing briefs is that Petitioner lacks standing in this Court. This reply effectively scotches this objection.

I. The Statute and Board Regulations Analyzed

A. The Basic Statute Authorizes This Petition

There are a few sections of the amended Wagner Act which bear upon Petitioner's claim to standing:

1) There is no question but that Petitioner is a "person aggrieved" factually and statutorily. The facts, so disclose and the basic Statute, in §10(b), *proviso*, so denominates the Petitioner.

2) In §10(f) of said Act "Any person aggrieved by a final order of the Board" may seek review by filing a written petition with a Court of Appeals, the clerk of which then transmits a copy to the Board, "and thereupon the aggrieved party shall file" a certified record.

3) Section 10(l), immediately after the proviso, states: "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony . . . ."

4) Section 2 of the basic Act has twelve subdivisions which define various terms, e. g., person, employee, but nowhere is "party" defined.

B. The Labor Board's "Rules and Regulations" Support This Petition

The Labor Board's Rules and Regulations, Series 8, were issued on November 4, 1959, published November 7th (24 F. R. 9095), and became effective November 13th. Sub-Parts A and B are here pertinent. They contain the following sections:

1) Section 102.8 defines "Party," which includes, "without limitation, any person filing a charge or petition under the act . . . ."

2) Section 102.14, places the onus for the timely and proper service of a copy of the charge upon "the charging party [who] shall be responsible" therefor.

3) Section 102.15 informs that the regional director shall thereafter "issue and cause to be served upon all the other parties a formal complaint" if it appears to him such should be issued.

4) Section 102.19 requires the regional director to advise "the parties" if he declines to issue a complaint, whereupon "The person making the charge may obtain a review of such action" "of the general counsel in Washington."

5) Section 102.27. Where a trial examiner, before filing his intermediate report, grants a motion to dismiss a complaint in its entirety, "any party may obtain a review" of the Board in Washington.

6) Numerous other sections mention "any party," e. g., §§102.37, 102.38, 102.42, 102.46, or "all interested parties," §102.51, whereas "the respondent" is separately particularized, e. g., §§102.8, 102.20, 102.21, 102.23, 102.45, 102.52, 102.54, 102.55.

Subpart I of the Rules and Regulations, entitled "Service and Filing of Papers," contains §102.112: "Service of papers by a party on other parties shall be made by registered mail" etc. (See also §102.113[b].)

Subpart M, in its only section, §102.121, states that "The Rules and Regulations in this part shall be liberally construed to effectuate the purposes and provisions of the act."

C. Analysis of and Conclusions Based Upon the Statute and Regulations

We can admit, at the outset, that ambiguity exists in both the statute and the Regulations concerning the exact initial and continuing status of a charging party. Still, if clarity is lacking, a petitioner such as this should not be penalized. The statutory procedural scheme is not violated when the very party for whom a back pay award is made finds himself "damaged," "injured," and "aggrieved" by a reversal of the Court of Appeals and now desires a review. Could Winzelberg, the Petitioner herein, have sought judicial redress from the Board's order? Could he claim he was damaged, injured, or aggrieved thereby? Did not the Board recognize and treat him as a party? What could Winzelberg do other than what he did do? Respondents impliedly say he should have intervened. But why? Was he not already a party? Would not the Court of Appeals have accepted and filed a brief of his in support of his back pay award? Why commit a useless act for no ultimate reason?

Even more ridiculous would be a statutory or Board actual and express procedural requirement for intervention. Follow it out practically: the Board has 90 days within which to petition for certiorari from a final determination of a Court of Appeals; at any time within this period any "party" or "person" involved in any way in these proceedings, and whose interest is as plain as is Wingelberg's herein, can move in the Court of Appeals to intervene for the express purpose of taking certiorari; any such motion would have to be granted procedurally, factually, discretionarily,

and perhaps constitutionally; thus the mere filing of a short motion would effectuate what Congress and the Board are alleged by these Respondents not to have permitted directly.

II. The Cases Analyzed

A. Those Cited by Respondents

All three Respondents have cited and relied upon *Amalgamated Utility Workers* v. *Consolidated Edison Co. of New York,* 309 U. S. 261, and all three Respondents have quoted from it to the effect that "The Act gives no authority for any proceeding by a private person . . . to secure enforcement of the Board's order. . . ." Agreed. Thus if the Labor Board had made an award herein to Winzelberg and then had done nothing, Winzelberg could not himself have petitioned the Court of Appeals for an enforcement order. We do not quarrel with the reason for or the law itself.

However, how does this square with the situation here presented? The Board has already sought enforcement and the Court of Appeals has agreed so to do in part; it is in the part which it refuses to enforce that, on the law involved, Wingelberg desires review herein. He does not seek enforcement in the immediate sense envisaged by the *Amalgamated Utility* case; but none, including Respondents, would argue that Winzelberg could not have supported the Board's petition for enforcement, become a "party" via intervention or otherwise, and then have had "standing" for this petition. So it is not the concept of initial enforcement which is here involved; rather, it

is merely a procedural question of whether Winzelberg is to be recognized as being able to petition herein. The *Amalgamated Utility* case involves a substantive element of standing to sue, whereas now all Respondents (they even argue it) apparently concede this but claim that no procedural basis can be found.

B. Other Cases

This Court, in *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, at page 11, spoke of the power of the Labor Board to make remedial orders, and then concluded: "All these measures relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole." And, although dissenting, Messrs. Justices Black and Douglas felt that "The central policy of the Act is protection to employees from employer" unfair labor practices (at p. 14).

In Point I, subd. C, *supra*, mention was made of the substantive-procedural distinction relating to standing, and the suggestion was made that the Respondents herein have fallen into a trap of their own making when they cited and relied upon the *Amalgamated Utility* case, *supra*. For example, in *City of Chicago* v. *Atchison, Topeka & Santa Fe Railway Company*, 357 U. S. 77, Railroad Transfer Service and the Railroads asked for a declaratory judgment on the inapplicability or invalidity of a City ordinance. "Parmalee was permitted to intervene as a defendant" (at p. 81). And yet, after granting the City's petition for

certiorari, counsel for Parmalee and Transfer "were asked to discuss the following jurisdictional questions: '1. Whether Parmalee Transportation Co. has standing to seek review here on appeal or by writ of certiorari. . . .'"

The entire Court felt that Parmalee could appeal (the dissenters did not argue this question and apparently likewise felt Parmalee could appeal), and the reasoning given is as follows:

> "Parmelee has standing to secure review of the judgment below by appeal. It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by Transfer's operation. . . . It seems to us that Transfer's argument confuses the merits of the controversy with the standing of Parmelee to litigate them. . . ." (at p. 83).

Three other cases are of interest and importance, namely, *Consolidated Edison Company* v. *N. L. R. B.*, 305 U. S. 197; *International Union of Mine, Mill and Smelter Workers, Local No. 15* v. *Eagle-Picher Mining and Smelting Company*, 325 U. S. 335; and *Williams* v. *Morgan*, 111 U. S. 684.

In the *Consolidated Edison* case a C. I. O. affiliate filed a charge with the Labor Board that the Consolidated Edison Company was dominating an A. F. L. affiliate, and the Labor Board found that a Consolidated—Brotherhood (AFL) contract was invalid; the Board decided the Company had not committed an unfair labor practice but nevertheless required it to

cease and desist from giving the contract any effect. The Company petitioned the Circuit Court of Appeals to set aside the order, "and a petition for the same purpose was presented by the Brotherhood and its locals. These labor organizations had not been parties to the proceeding before the Board but intervened in the Court of Appeals as parties aggrieved by the invalidation of their contracts. . . . We issued writs of certiorari upon applications . . . of the Brotherhood and its locals" (at p. 218).

In the *International Union* case the Board's order directed back pay, and the employers sought review in the Circuit Court of Appeals. "The Unions, who are petitioners in this court, were permitted to intervene and were heard in support of the Board's order. . . ." (at p. 337). The Court decreed enforcement but, after nearly two years of checking and investigating, the Board felt that the original Court decree was somewhat in error because of the new facts disclosed during this two-year investigation; the Board thereupon petitioned the Court of Appeals to vacate a portion of its earlier order and remand for further consideration. The Unions again were permitted to intervene and to argue in support of the Board's petition. The Court dismissed the petition on its merits and the Board's petition for rehearing was denied, as was the Union's separate motion to modify the decree or vacate the paragraphs in question.

The employer's arguments in this Court contained the following point: "Petitioners are without capacity to prosecute an application for certiorari to review the ruling below upon the Board's petition. They were also without capacity to file the motion to

modify or remand the decree. The court below was without jurisdiction to entertain that motion. As a result petitioners cannot seek to review by certiorari the rulings criticized." The employer cited, amongst others, the *Amalgamated Utility* case, relied upon by all three Respondents herein.

This Court, at p. 338f., answered this contention as follows:

> "They also attack the standing of the petitioners to seek review by this court when the Board, the body charged with the enforcement of the National Labor Relations Act, has elected not to seek review. We think that, in the circumstances disclosed, the petitioners, though they could not have instituted enforcement proceedings, had standing to seek review of the order denying the Board's petition."

In a footnote to this last clause this Court cited the *Consolidated Edison* case and also *Williams* v. *Morgan, supra.* In the *Williams* case objection was made to the ability of Williams and one Thomson to appeal, and this was said to be dependent upon their right to intervene for the purpose of contesting the allowances to the Trustees. This Court upheld their right so to do, and the power of the court below so to permit, and stated:

> "We think that the position of Williams and Thomson made them *quasi* parties in the case and brought them within the reason of the former cases decided by this court in which persons incidentally interested in some branch of a cause have been allowed to intervene for the purpose

of protecting their interest, and even to come into this court or to be brought here on appeal, when a final decision of their right or claim has been made by the court below. . . ." (at p. 698f.).

C. Conclusions on the Cases

The unity of opposition amongst the three Respondents discloses that they all must stand or fall together.

The *Amalgamated Utility* case, *supra,* merely holds that a charging party cannot bring enforcement proceedings in the Court of Appeals. We agree and do not quarrel with this doctrine. But the other cases above cited and quoted, namely, the *Consolidated, International* and *Williams* cases, disclose that completely "external" persons actually did intervene in proceedings and then took certiorari into this Court. There was intervention *qua* intervention. In the instant proceedings there was no formal intervention, and Winzelberg, the Petitioner herein, never moved for this formal relief.

If the cases cited by all three Respondents are to be relied upon, then what should a charging party, seeking to preserve all his rights, be forced to do? Obviously, he must intervene, and do this formally.

The Board's Rules and Regulations, in the only section devoted to this, §102.29, speak of "Any person desiring to intervene . . . ."

But to this point in these Rules a charging party, as per the definitions and other sections quoted above, is already "in" as a party; what greater rights would intervention now give?

So, as already seen, Winzelberg did not have to move for relief which was redundant, superfluous, and unnecessary. He was already a party, not alone in fact but by yirtue of the statutory and Board prescriptions. He was not alone factually interested but financially so. He was the individual in whose favor a back pay order had been made; he was the individual who was financially interested in the outcome (not the Union, as in the *International Union* case on behalf of the employees directly); he was an actual, financial, and legal party to the proceedings from the very beginning.

But the *Williams* case permits Winzelberg to be denominated a "*quasi*-party," if that term may be utilized herein. Regardless, Winzelberg has standing herein.

If Winzelberg is denied this standing then what are the consequences in terms of charging individuals? They are parties, as above disclosed, but they cannot process anything; they must follow in the wake of the Board's efforts; and, finally, they cannot do aught into and through the enforcement stage. At what point can the party who initiated the proceedings, who stands to gain or lose by it, whose entire economic life is affected by it—at what point can such an individual be heard? It is submitted that in the type of situation found here it can only be as Winzelberg now claims, *via* a petition for this writ. If he had sought redress before this he could not have done anything; any other holding permits the Labor Board to act the part of a minor administrative lord, determining whether or not Winzelberg and others like him can seek review in this Court. This power is

one not granted it, which it should not have or seek indirectly to utilize, and which should be denied it by permitting this petition to lie.

It is respectfully urged that this procedural item is not on the merits, and that this Court may, nevertheless, decide against the Petitioner. All that is requested is the opportunity, in a democratic nation, to present a petition for redress, and this centuries-old procedure should not be denied one in the factual situation here disclosed.

III. Petitioner Has Standing in This Court and the Writ of Certiorari Should Be Granted

Respectfully submitted,

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